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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. [redacted] 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REJOINDER TO PETITIONERS' REPLY BRIEF.

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THE BALLOU PRESS NEW YORK

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IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
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Preliminary Statement.

Upon submission of the petitions for certiorari in the above cause, petitioners filed a 28-page brief in reply. Rejoinder

thereto is required to correct the misapprehensions which may result from permitting misstatements of law and fact contained in said reply brief to go unchallenged.

In violation of the rules of this Court, petitioners' reply brief repeatedly asserts facts without reference to the record; makes references to the record which fail to support the assertions purporting to be based thereon; and discusses matters patently outside of the record (reply brief, pp. 10-16). A detailed recital thereof would unduly encumber this brief in rejoinder.

Petitioners' brief in reply refers to the filing by petitioners with the Clerk of this Court of copies of a claim filed in, and a rule to show cause issued by, the District Court subsequent to the entry of the orders sought to be reviewed by the present petitions (Reply Brief, 10). No copies of these papers have been served by petitioners upon respondents. Such papers are not part of the record. If such presentation of alleged facts outside the record were to be permitted, it would be necessary to present to this Court the complete record upon the return of said rule to show cause. This Court would then be called upon to review the action of the Court below upon a record different from the one upon which the Court below acted in rendering its decision.

We believe that orderly practice requires that the arguments before this Court be based on the facts before the Court below and that the issues before this Court be not enlarged by the introduction of facts not before the Court below; and we therefore respectfully request that all statements in petitioners' reply brief which are not supported by correct and appropriate reference to matters in the record be disregarded in accordance with the rules of this Court.

No. 726.

1. Brief in rejoinder to petitioners' reply brief upon petition for review of order making receivership permanent.

A. *The recital in the decree making the receivership permanent that such decree was entered without objection is conclusive and may not here be questioned.*

Petitioners (Reply Brief, 2-4) challenge the veracity of the recital contained in the order of the District Court (R. 209), viz: "there being no opposition to the making of the said receivership permanent and no application for any modification of said order". Petitioners have at no time made any application to modify that recital. It cannot be challenged upon appeal.

> *Ex parte Spiess,* 123 U. S. 131, 182; 31 L. Ed. 80, 91; *Evans* v. *Stettnisch,* 149 U. S. 605, 607; 37 L. Ed. 866, 867.

Upon the appeal to this Court in *Ex parte Spiess, supra,* the correctness of recitals of the record as to the proceedings had below was challenged. This Court ruled at page 182:

> *"If this is not in accordance with the fact, the record must be corrected below, not here."*

The foregoing rule of law makes it unnecessary to dwell upon the fact that the objections to the decree to which petitioners refer in their reply brief (p. 3), were first asserted in an affidavit filed (R. 198) *after the District Court had rendered its decision* (R. 195); or upon the fact that the representative of the National Surety Company, the leading petitioner, admitted his participation as a member *ex officio* of the Creditors' Committee, and stated upon the hearing in the District Court *"It is true I attended every meeting"* (R. 181).

B. *The Court had jurisdiction to make the decree.*

Jurisdiction in the District Court to make the receivership permanent is attacked in petitioners' reply brief (pp. 4-17) upon the following grounds: (1) That solvency of the defendant is an essential requisite of equitable jurisdiction upon a creditors' bill to administer the defendant's assets. (2) That upon a creditors' bill, equity is without jurisdiction unless complainant has exhausted legal remedies by judgment and a return of execution thereon unsatisfied. (3) That the administration of defendant's assets in equity unlawfully impaired petitioners' rights under the Bankruptcy Act.

The first two of petitioners' contentions are completely answered by this Court's opinion in *Hollins* v. *Brierfield*, 150 U. S. 371, 380, 37 L. Ed. 1113, 1115. That case directly raised the question of equitable jurisdiction in the appointment of a receiver upon a creditors bill. The Court stated:

> "* * * Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal * * * **the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the court, it has power to proceed with such administration.** If there was a defense existing to the bills as framed, **an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction.** This doctrine has been recognized not merely in the cases cited, but also in those of *Reynes* v. *Dumont*, 130 U. S. 354 (32: 934); *Kilbourn* v. *Sunderland*, 130 U. S. 505 (32: 1005); *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530 (33: 1021). * * *"

The rule stated in *Hollins* v. *Brierfield, supra,* is not altered by the recent decisions of this Court cited at page 7 of petitioner's reply brief. In *Mathews* v. *Rodgers,* 284 U. S. ; 76 L. Ed. 271, 273 (No. 84, October Term, 1931, decided February 15, 1932), *this Court expressly recognized and accepted the distinction between a complete lack of equitable jurisdiction and the existence of defenses to the exercise of that jurisdiction.* This Court's decision in *Stratton* v. *St. Louis Southwestern Railway Company,* 284 U. S. ; 76 L. Ed. 276, 277 (No. 178, October Term, 1931, decided February 15, 1932) cites and follows *Mathews* v. *Rodgers, supra.*

Petitioners' third contention, *i. e.,* that administration in equity unlawfully impaired petitioners' rights under the Bankruptcy Act, is, both in matter of fact and in matter of law, without merit. Petitioners' repeated assertions that the defendant was insolvent within the meaning of the Bankruptcy Act are without support in the record. Petitioners' statement "with both courts finding the defendant corporation insolvent within the meaning of the Bankruptcy Act" (Reply Brief, p. 5) is *not supported by any reference to the record, and nowhere in the record can any such finding be found.* Petitioners assert (Reply Brief, p. 5) that "a state of bankruptcy was admitted by counsel for the defendant (R. 70)". At that page of the record it appears that counsel for the defendant, in colloquy with the Court and a creditor, stated:

> "There is more than ample there to pay him one hundred cents on the dollar."

Petitioners assert (Reply Brief, p. 5) that a state of bankruptcy "was apparent on the face of the financial statement such as was available" (R. 83, 84). That financial statement, which is part of the record (R. pp. 196, 197), reflects total liabilities of $1,072,000.30 and total assets of $4,116,215.04. In matter of law, as has already been pointed out (Respondents' brief in opposition pp. 11-12) the appointment

of an equity receiver did not and *could not impair* the power of petitioners to assert their rights under the Bankruptcy Act by the filing of a petition in bankruptcy.

CONCLUSION.

(1) The order, by its recitals, conclusively establishes that such order was made without objection (*Ex parte Speiss*, 123 U. S. 131, 182).

(2) Equitable jurisdiction was not ousted by petitioners' allegation that defendant was insolvent. (*Hollins* v. *Brierfield*, 150 U. S. 371, 380; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500).

(3) Complainant's failure to obtain judgment and a return of execution thereon unsatisfied, did not deprive the court of jurisdiction but merely constituted a possible defense (*Hollins* v. *Brierfield, supra*); and the recitals of the order conclusively establish that such defense was waived.

(4) The appointment of an equity receiver did not and could not impair the right of petitioners to invoke the provisions of the Bankruptcy Act by the filing of a petition in bankruptcy.

The petition for review of the order making the receivership permanent is not entitled to consideration of this Court, under the rules governing the issuance of writs of certiorari.

No. 727.

Respondents' Brief in Rejoinder to Petitioners' Reply Brief Upon Petition for Review of Order Awarding the Payment in Cash to Petitioners of Aliquot Share of Defendant's Assets.

We will not enumerate the erroneous statements of fact contained in petitioners' reply brief upon the instant petition. The preliminary statement made in respondents' brief in rejoinder upon the petition for review of the order making the receivership permanent is here fully applicable. We omit repetition thereof.

The arguments advanced in petitioners' reply brief (pp. 18-25) in support of the instant petition, are herein considered in the order in which they are advanced by petitioners.

1. Petitioners state (Reply Brief, p. 18) that there was no sale of the defendant's assets. That statement is repudiated by the specific facts on the record, set forth in respondents' brief in opposition (pp. 4, 11). Those specific facts are nowhere challenged by petitioners. They conclusively establish that the receiver duly published in The New York Times, and served upon all creditors, notice of a public hearing to consider any offers for the purchase of the defendant's assets which might then be made, and that upon such hearing the only offer for the purchase of the defendant's assets was the one approved by the District Court.

2. Petitioners assert (Reply Brief, p. 19) error by the Circuit Court of Appeals in its reliance upon the case of *Geddes* v. *Anaconda Co.*, 254 U. S. 590, as authority for the appointment of a special master to ascertain petitioners' respective aliquot shares in the realizable value of defendant's assets upon public sale. It is the petitioners who are in error. That case was cited by the Circuit Court, not for the proposition stated by petitioners, but as authority for award-

ing to petitioners the option to claim the cash value of the preferred stock and notes offered to them under the terms of sale approved by the District Court (R. 265).

3. The statement in petitioners' reply brief (p. 20) that "any reorganization which recognizes and preserves the interests of the stockholders at the expense of creditors is invalid" and the citation of *Northern Pacific Railway* v. *Boyd*, 228 U. S. 482, as authority therefor, are accurate, but wholly without relevance. By the order of the Circuit Court sought to be reviewed, petitioners have been relieved from the acceptance of the plan of reorganization embodied in the offer approved by the District Court. In lieu of the stock and notes to be paid to assenting creditors, the Circuit Court has awarded to petitioners the payment in cash of their respective aliquot shares of defendant's assets. In so far as the reorganization plan affects the rights of assenting creditors, it provides that such creditors must be paid 100% of their claims in full before there can be any payment made to stockholders of the old corporation (R. 39, 40), and therefore wholly complies with the principle of the *Northern Pacific Railway* v. *Boyd* case, *supra*.

4. Petitioners dwell at length (Reply Brief, pp. 20-21) upon the possible errors which may be committed by the Special Master in ascertaining the realizable value of the defendant's assets upon a public sale for cash. Those errors have not as yet been committed. Petitioners have no right to assume that error will be committed by the Special Master and to appeal in advance therefrom.

5. We stated in respondents' brief in opposition (p. 9) that not one of the cases cited at page 7 of the petition supports petitioners' contention that the Circuit Court of Appeals erred in holding the petitioners were limited to an aliquot share in cash of the sum ascertained to be the realizable value in cash of the defendant's assets at a public sale as of June 15, 1931. Petitioners' reply brief (pp. 22-24) again

refers to the same authorities in support of the same contention. We here repeat our former statement with respect thereto. Those authorities hold either that under the express provisions of the Bankruptcy Act the assets in the bankrupt's estate must be sold for money (*In Re Prudential Outfitting Co.*, 250 Fed. 504; *In re J. B. and J. M. Cornell Co.*, 186 Fed. 859; *In Re Northampton Portland Cement Co.*, 185 Fed. 542); or, that the authority of a receiver of a national bank to fix terms of sale is fixed by statute (*In Re Sale of Assets of First National Bank of Florence*, 6 F. (2d) 905); or else that the lien of *secured* creditors upon the assets of an insolvent corporation cannot be subordinated to obligations created by the receiver (*In Re J. B. & J. M. Cornell Co.*, 201 Fed. 381; *Merchants Loan & Trust Co.* v. *Chicago Railways Co.*, 158 Fed. 923; *Kneeland* v. *American Loan Co.*, 136 U. S. 89; *Gay* v. *Hudson River Electric Power Co.*, 184 Fed. 689). The rulings in those cases are not disputed. They are, however, without any relevance to any of the issues here before the Court. As additional authority for their contention, petitioners now cite (Reply Brief, p. 24) the case of *B. Borchardt & Co.* v. *Yaryan Naval Stores*, 206 Fed. 366. We most respectfully refer the Court to that case. It will be found utterly without pertinence.

6. The application by the Special Master of the ordinary rules of presumption and proof to determine the amount which would have been realized upon a public sale of defendant's assets for cash is not the novel question which petitioners would make it (Reply Brief, p. 24). Similar questions are presented for determination in ordinary legal proceedings, and legal procedure has hitherto been found adequate to make such a determination (*vide respondents' brief in opposition*, p. 11). Even granting for the purposes of argument that the Court below should have ordered a sale as distinguished from an estimate, the decision of the Circuit Court of Appeals was handed down on November 16, 1931. The assets had been transferred to the purchaser on June 15, 1931, and the plan of reorganization had been put into

effect. The purchaser had continued the business of the defendant from June 15, 1931, to November 16, 1931. An actual sale as of June 15, 1931, was obviously impossible on November 16, 1931. Only an estimate was possible. The opinion of the Circuit Court of Appeals was practical rather than theoretical.

CONCLUSION.

(1) Petitioners, as creditors of the defendant, are merely entitled to their respective aliquot shares of the defendant's assets.

(2) The order of the Circuit Court of Appeals sought to be reviewed awards to petitioners the payment in cash of their respective aliquot shares of the defendant's assets.

(3) The determination by the Special Master of the amount to be awarded to petitioners in cash, on account of their respective aliquot shares of the defendant's assets, through the application of established rules of presumption and proof, does not present a problem outside the scope of ordinary legal procedure. A sale on November 16, 1931, as of June 15, 1931, of assets not in existence on the later date, was obviously impossible. The Circuit Court of Appeals prescribed the only practicable machinery possible.

The petition for review of the instant order is not entitled to the consideration of this Court under the rules governing the issuance of writs of certiorari.

Respectfully submitted,

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April 28, 1932.